77-1080
NO. _____

In the Supreme Court of the United States

October Term, 1978

VIRGIL REDMOND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

LEVINE AND PITLER, P.C.
Robert L. Pitler
1150 Delaware Street
Denver, Colorado 80204
Registration No. 1139

Attorneys for Petitioner

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VIRGIL REDMOND, your Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Tenth Circuit, which was entered January 4, 1977. A timely Petition for rehearing was filed with the Court of Appeals, and same was denied on December 21, 1977. The decision of the Appellate Court affirmed the judgment of conviction entered in the United States District Court for the District of Utah, Central Division, the Honorable Willis W. Ritter, Trial Judge. Petitioner is convicted of eight counts alleging the use of mails in a fraudulent sale of securities. 15 U.S.C. §§77q(a) and 77x.

The principal grounds for appeal to the United States Court of Appeals, Tenth Circuit, were based upon:

I.

VIRGIL REDMOND, PETITIONER, WAS DENIED A FAIR TRIAL DUE TO THE CONDUCT OF THE TRIAL JUDGE IN EXPRESSING OPINIONS OF THE GUILT OF THE PETITIONER AND HIS CO-DEFENDANTS. THE TRIAL JUDGE ASSUMED THE ROLE OF THE PROSECUTOR. THE COURT MAINTAINED A DEMEANING ATTITUDE TOWARD DEFENDANTS' COUNSEL.

II.

PETITIONER'S ATTORNEY WAS INTIMIDATED BY THE CONDUCT OF THE TRIAL JUDGE AND AS A CONSEQUENCE HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

III.

MISCELLANEOUS PROCEDURAL ISSUES.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, entered January 4, 1974 was selected for official publication and is reported at 546 F.2d 1386 (10th Cir. 1977), and is attached in appendix A, infra.

DATE OF JUDGMENT AND TIME OF ENTRY

The Judgment of the Court of Appeals was entered on January 4, 1977. The Petition for rehearing was denied on December 21, 1977.

JURISDICTION

Jurisdiction of this Honorable Court is pursuant to 28 U.S.C. §1254(a).

ISSUES PRESENTED

I.

THE CONDUCT OF THE TRIAL COURT SO PREJUDICED PETITIONER'S CAUSE, HE WAS DENIED DUE PROCESS OF LAW AS WELL AS EFFECTIVE ASSISTANCE OF COUNSEL.

II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

CONSTITUTIONAL PROVISIONS INVOLVED

A. United States Constitution:

AMENDMENT V

As pertinent here, provides:

". . . nor be deprived of life, liberty, or property, without due process of law; . . ."

AMENDMENT VI

As pertinent here, provides:

". . . In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATUTES

A. 15 U.S.C. §§77q(a) and 77x

As pertinent here, provides:

§77q. Fraudulent interstate transactions.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly–

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

§77x. Penalties.

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations

promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement, filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

CONCISE STATEMENT OF THE CASE

Virgil Redmond, hereinafter referred to as "Petitioner", was charged in a multicount indictment with the use of the mails in the fraudulent sale of securities. (15 U.S.C. §§77q(a) and 77x. The case was tried and Petitioner found guilty of eight counts. He was sentenced to serve eighteen years in a Federal Penitentiary and was fined $10,000.00.

The trial of Petitioner included co-defendants. One co-defendant was Rio de Oro Mining Company. The prosecution submitted evidence which tended to show Petitioner and the co-defendants were engaged in a scheme to defraud members of the public by selling stock of the defendant corporation. Rio de Oro Mining Company controlled gold, coal, uranium and other minerals. The Government claimed there were no minerals and the mines were used as part of a conspiracy to sell stock in a worthless corporation. Petitioner at the trial and appellate levels, urged he had withdrawn from the conspiracy to distribute stock to nominees, and to exchange same for goods and services. His theory was not allowed to go to the Jury.

Defense counsel did not offer evidence in Petitioner's behalf. There was evidence the mines in Utah contained coal. Evidence which would have helped the Petitioner. During the course of trial, conduct of the Trial Judge becomes an issue.[1]

[1] The question of instructions, speedy trial and other issues which were raised at the Appellate level, are not being urged to this Court as a basis for the issuance of the Writ of Certiorari.

The Honorable Willis W. Ritter, hereinafter referred to as Judge Ritter or Trial Court, caused Petitioner's trial to be tainted. Petitioner urges he was denied due process of law and effective assistance of counsel. Justice Seth, in describing the conduct of the Trial Court in the instant case stated:

> ". . . We said in the *Golden Rule* case that the comments taken as a whole did not destroy the fairness of the trial. When the standards in the above entitled case are applied, *we must say here that the case before us comes close to the line,* but is still within permissable bounds."[2] (Emphasis supplied.)

This Petition encorporates a separate appendix hereinafter referred as Appendix No. One. Appendix One is a copy of the Petition for Writ of Mandamus Or Prohibition submitted by the Solicitor General of the Department of Justice to United States Court of Appeals, Tenth Circuit, concerning the conduct of the trial Judge. References to Appendix One will be made during the course of this statement as well as following arguments. The complaints in Appendix One mirror the complaints of Petitioner.

Some of the more flagrant examples of conduct during the course of his trial are hereinafter set forth. References are to the transcript volumes presently in the possession of the Clerk of the United States Court of Appeals, Tenth Circuit. Judge Ritter starts his four day trial. Vol. II, p. 66, lines 17-23 (Jury present):

> ". . . Alright, proceed. I will tell you about these opening statements. I want them brief and concise. I want them to the point. And I don't want them very long. And we don't have that kind of time. I think they serve a very poor purpose, anyway.
>
> If I hear any argument in the opening statement, I will stop you and tell you to take your seat."

Prior to this colloquy between court and counsel, the Judge had been informed the trial would take three weeks.

[2] At page 1391 (546 F.2d 1386).

The government had anticipated the trial would have taken approximately two weeks, and according to Judge Ritter, Judge Halbert had been told that the trial would require three weeks (Vol. IV, p. 800, lines 22-23). However, Judge Ritter stated the trial was going to take four days. (Vol. IV, p. 800, line 25.) Fifty witnesses and exhibits notwithstanding, the trial was going to last four days.

In order to achieve his goal the Judge commenced jury selection. At Vol. II, p. 54-55, the Court is addressing a prospective juror.

> "Mr. Elliott: The two new ones, Mr. Nelson and Mr. Robinson.
> The Court: Okay. What is your occupation?
> Juror: I work for the State of Utah, Department of Community Affairs.
> The Court: In what capacity?
> Juror: State Volunteer Programs Coordinator is my title.
> The Court: State volunteer programs for what?
> Juror: Coordinator. State Volunteer Programs Coordinator.
> The Court: You are a correlator?
> Juror: Coordinator.
> The Court: Coordinator. What do you coordinate?
> Juror: All the State Volunteer Programs in the state.
> The Court: What do the volunteers do?
> Juror: Any state agency who uses volunteers, I help coordinate their program.
> The Court: Well, you are not going to coordinate anything here. You step down."

The Trial Court refused to rule on certain pre-trial motions submitted by Petitioner as well as the other co-defendants. Although the question of speedy trial is not being asserted in this Petition, the issue was raised at the trial and appellate levels.

From the very beginning of the trial, all of the lawyers in the case, both for prosecution and defense were intimidated and unable to fully function for and behalf of their respective

clients. For example, Mr. Van Durunen who represented Rio de Oro had been identified as "young man" by a Juror. Judge Ritter (Vol. I, p. 40, lines 22-23) for some reason had some great objection to the expression of thanks by Mr. Van Durunen in being referred to as a "young man." The Judge stated *inter alia* "Never mind. You won't be after we get through this trial."

During the course of choosing the jury, after Judge Ritter had exhausted the entire panel and new jurors had been called, at Vol. II, p. 49, lines 16-26, he stated:

> "Now, I tell you that much about the case in order to ask you a few questions.
> Have you ever heard of a case like that, or have you ever been concerned with a case like that?
> Has anybody ever attempted to impose upon you or has anybody imposed upon you by peddling stock or securities?
> Have you ever heard of a case like that? Any of you at all?"

During the course of trial certain occurrences, such as above, took place which not only insured the Petitioner would be found guilty, but also intimidated his counsel. During the course of cross-examination by Mr. Leedy, Petitioner's trial counsel, he asked certain questions of Mr. Holeman, a witness, concerning geological formations of ground owned by the defendant corporation. It was the Defendant's theory the property did have mineral values and hence there was no fraudulent transaction. In that regard Mr. Leedy at Vol. II, p. 181, line 21, asked the question: "And did the information that was contained in the U.S. Geological Survey confirm *everything* that Mr. Redmond had told you?" Upon receiving an affirmative response by the witness, Mr. Leedy sat down. Then the Court stated at p. 182 the answer was a broadside. The Court inquired of the prosecution whether it wanted to cross-examine. When Mr. Mabe, U.S. Attorney stated, "Pardon me, your Honor?", the court just proceeded to conduct its own examination for approximately three pages of the transcript.

At the conclusion of the examination, the word "everything" used in the question by Mr. Leedy, was stricken from the record. It should be noted at no time did Mr. Leedy object to the questions of the Court, and in fact later apologized to the Court for even asking the question. (Vol. II, p. 184, line 18.) There had been no motion or request to strike by the Respondent.

In the trial, Mr. Kroulis is a witness. The issue involved in the law suit is whether or not fraudulent acts concerning the sale of securities were committed by the Petitioner and the co-defendants. During the course of examination by the government, Mr. Kroulis testifies concerning the amounts of money owed to him by the defendant corporation. Its officers were seeking to satisfy the debt with the exchange of stock of the corporation. In addition, Mr. Powers, one of the co-defendants, according to Mr. Kroulis' testimony, was also seeking to sell to Mr. Kroulis a boat for the purpose of retiring some of the corporate debt. Mr. Kroulis states he and Mr. Powers during the course of the discussion reached the point between debtor and creditor where demands are being made for payment. Mr. Kroulis testifies Mr. Powers states he has been known to kill a man in Kentucky some years prior, and he should not be pushed. The testimony is admitted over objection by the Defendants.

The Court not only overrules the objection but at p. 473 of Vol. III at line 20, the Court states, "Well, let's see if we can find out more about that." Then, after making inquiry in front of the jury, the Court concludes, at p. 474, "Did the jurors hear that? Alright, Now, who was talking?"

The excerpts which have been presented to this Court are in an effort to illustrate the overall impact of Judge Ritter's actions in the trial of the Petitioner which resulted in a lack of due process being afforded to Petitioner. Nor was he afforded the effective assistance of counsel, since Mr. Leedy was unable to participate fully in the trial.

Attached hereto in Appendix B is the affidavit of Virgil Redmond. Mr. Leedy, Mr. Redmond's trial counsel, has submitted an affidavit denying each and every statement found in

Mr. Redmond's affidavit. However, upon inquiry by present counsel, Mr. Redmond insists his affidavit is true and the statements of Mr. Leedy are incorrect.

During the course of the trial, witnesses were being held hostage. For example, Vol. II, p. 68, lines 5-15, the Court orders the sequester of witnesses. Mr. Hatch, one of the attorneys in the case, advises the Court it is his desire to talk to some of the witnesses prior to testifying. The Court refuses to allow him to talk to the witnesses, forbades the witnesses from talking to anyone and orders the United States Marshall to guard them. See attached Appendix D.

During the course of pre-trial, Douglas W. Litchfield informs the government as to the nature of his testimony. When Petitioner learned of the nature of his testimony, he contacted the witness who agreed to testify for the defense. It was estimated the trial would take two to three weeks. Hence, it necessitated a readjustment of scheduling when Judge Ritter said it would take four days. Virgil Redmond's trial counsel made no request for a short recess in order to allow the witness to fly from Montana to Utah. Appendix C, the affidavit of William Douglas Litchfield is included.

With the announcement of the verdict, the Judge congratulated the Jury on reaching the "proper" decision, and immediately raised the bail of the Defendants to $500,000.00, notwithstanding the prosecution requesting $100,000.00. The judge was incensed and angered throughout the entire trial. He opined many times he did not have stomach for the trial and did not want to try it. At the conclusion of the case he denied pre-trial motions, because he wanted to make sure jeopardy would attach and the guilty persons would not "get off".

The United States also complains about the conduct of Judge Ritter. (See Appendix One, not attached to the Petition.) *No* assertion is made the Judge is dishonest or a bad person. However the government argues Judge Ritter is a law unto himself and brings disrespect upon the judicial system. It also asserts Judge Ritter's trials do not result in the admini-

stration of justice. The government's Petition was filed with the Court of Appeals, Tenth Circuit, who had knowledge of same when it denied Redmond's Petition for rehearing.

It is from this framework that the following argument is submitted.

REASONS FOR GRANTING WRIT

I.

THE JUDGE'S ACTIONS DEPRIVED PETITIONER OF DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner, although he could have urged to this Court all of the propositions which were urged to the Court of Appeals, he chose not to do so. Rather he is choosing to submit the issue concerning the failure of the lower Court to recognize the impact of Judge Ritter's conduct in this case. The lower Court sees it, but does nothing to remedy the situation. It cannot be overlooked that Justice Seth, with having no compelling need or obvious reason, went to some extent to find the conduct of Judge Ritter ". . . comes close to the line, . . ." It is the position of your Petitioner, Judge Ritter crossed the line.

The Tenth Circuit over the years has built judicial veneers in attempting to sustain the trial conduct of Judge Ritter. If at any time the Tenth Circuit were to grant reversals due to the conduct of the Judge Ritter, they would be flooded with Petitions having claimants bearing rights entitling them to relief. The problem has been hidden in phraseology which masks their true character. For example, in *Wittlock vs. The United States*, 429 F.2d 942 (10th Cir. 1970), the Court stated *inter alia*, counsel had been "rebuffed", "disappointed" and perhaps had "discomfort". What really occurred was trial counsel was intimidated, bullied and threatened in order to convict Mr. Wittlock. As to speedy trial in the instant case, the Tenth Circuit treated the issue as one of speedy trial. However, the real issue is the Judge failed or refused to rule on the motion until after the conclusion of the trial.

In *United States vs. Hatahley*, 220 F.2d 666 (10th Cir. 1955) the Court characterized the trial as, ". . . tried in an atmosphere of maximum emotion and a minimum of judicial impartiality . . ." (220 F.2d 670). And in *United States v. Ritter*, 273 F.2d 30 (10th Cir. 1959) it was noted as to the second appeal after re-trial (*United States vs. Hatahley*, 257 F.2d 290 (10th Cir. 1958)):

> ". . . [W]e again observe that a casual reading of the two records leaves no room for doubt that the District Judge was incensed and imbittered. . ."

The words describe a condition, but there is no remedy.

In *United States vs. Davis*, 442 F.2d 72 (10th Cir. 1971), Judge Ritter in a non-Jury trial setting so intimidated a lawyer that all parties were deprived of an impartial judicial atmosphere. The matter was reversed. However *Davis* does not signal a trend or a change in the thinking of the Tenth Circuit. Because surely, any court which would read the transcript in *Davis* and the instant case would agree the conduct of the Trial Court in the instant case was worse than in *Davis*.

The Tenth Circuit in its opinions isolates the separate acts of the Trial Court in a chamber. The Court refuses to deal with the issue of the affect on the trial when Judge Ritter makes his presence felt. One can only suppose what Justice Adams must have thought when he was reading the transcript in *Davis*. The brevity of his opinion coupled with an inclusion of the appendix indicates the Judge's concern concerning the prejudicial effect of Judge Ritter's conduct.

If this Honorable Court determines it is proper to decide cases of this type by an incident by incident basis, then it is likely the same decision as the Appellate Court of Appeals will be reached. If however this Honorable Court believes judicial misconduct should be judged by taking the totality of same and measure its effect on the trial itself, then it is respectfully submitted Certiorari should issue in the instant case. The facts in *Davis* are not nearly as severe as in the instant case, but they were judged differently. In *United States v. Redmond*, 546 F.2d 1386 (10th Cir. 1977), the

Court isolated each item of misconduct. Alone, each one was not enough to make the trial unfair, but in total they were. The Tenth Circuit does not follow the totality theory.

The social implications of Judge Ritter's conduct is far beyond the legal community. In January, 1978, on nation-wide T.V., one of the more popular shows, *Sixty Minutes,* aired to the populace, the judicial misconduct of Judge Ritter. Petitioner did not receive a fair trial. His conviction was not reversed, because of the historical reluctance of the Judges of the Court of Appeals. Yet, the people of Utah and the United States must question why no action has been taken by this Court.

In the instant case, Judge Ritter expressed opinions of the Defendants' guilt. He denied to make pre-trial rulings on pre-trial motions. He made comments following the Jury's verdict, and in fact raised the bond of Petitioner in front of the panel. (See *United States vs. Latimer,* 548 F.2d 311 (10th Cir. 1977)). The Judge assumed the role of prosecutor and Judge. The Judge injected evidence into the trial, and when not satisfied with the evidence submitted by the prosecution, he questioned the witnesses to obtain more. Who in this atmosphere would object to Judge Ritter or even try to oppose him in any regard? Certainly not the lawyers who practice in Salt Lake City, as the transcripts of all the manifold appeals to the Tenth Circuit will show. The lawyers are frightened of Judge Ritter. He in effect will excommunicate them from the federal court system in their district. [Cf. *United States vs. Latimer,* 548 F.2d 311 (10th Cir. 1977); record on appeal *United States vs. Latimer,* P. 596-97; *United States vs. Smith,* 495 F.2d 668 (10th Cir. 1974); and *United States vs. Cartwright,* ____ F.2d ____ no. 76-1017 (10th Cir., March 9, 1977)].

The Solicitor General in Appendix One has cited the instant case as one of the examples in support of their Petition To Remove Judge Ritter from trials in which the United States is a party. The Solicitor General asserted, "*. . . F. Respondent refuses to consider pre-trial motions until after jeopardy has attached.*" Miscarriages of justice result. To that point the United States has argued, *inter alia,*: "This Court

condemned that position in *Appawoo.* It is, unfortunately, not an isolated incident. Similar examples include ******United States vs. Rio de Oro Mining Co.,*** CR-74-52; . . ."[3]

II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Petitioner's conviction was affirmed in an opinion which is contradictory to a prior, but somewhat isolated opinion, in the Tenth Circuit, *United States vs. Davis, supra.* The opinion is also in conflict with decisions of other circuits concerning conduct which is relatively similar, but not as severe as the instant case. See *Young vs. United States,* 346 F.2d 793 (D.C.C.A. 1965), *Burnsten vs. United States,* 395 F.2d 976 (5th Cir. 1968) and *Johnson vs. United States,* 356 F.2d 680 (8th Cir. 1966). Please also see *Judges as Tyrants,* H. Schwartz, Crim. L. Bull. 7:129, March, 1971 at p. 132.

CONCLUSION

There is a need for Certiorari to issue because of the public concern and need involving the conduct of Judge Ritter. Although it must be emphasized the Judge as an individual or his honesty is beyond reproach. It is his judicial temperament and inability to control his personal feelings during the course of the administration of justice to the citizens of the United States that is questioned. One may wonder as to the cause, but "why" is not relevant to the question presented to this Court. What is relevant is whether or not your Petitioner received a fair trial. He, like countless others did not receive a fair trial because of the conduct of the Trial Court. The Supreme Court must issue its Writ so that it may exercise its supervisory authority in the administration of courts as well as to achieve justice for this Petitioner. The Solicitor General has stated the administration of justice has broken down in the central division of the District of Utah. The Solicitor General has stated to the Tenth Circuit *inter alia,* as follows:

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[3] Petitioner's co-defendant.

Thus there is no functioning federal court for civil cases of tax summons enforcement, no functioning federal court for misdemeanors and petty offenses, and, in a very real sense, no functioning court for felony cases.

"We do not impugn respondent's capacity or honesty as a judge. Our concern, rather, is that he has become a law unto himself. He invents and follows his own rules, he is swayed by his own preconceptions of legal procedure, and is determined that no outside force – not the arguments of counsel, not the holdings of this (Tenth Circuit) Court – shall interfere with the conduct of his court. He feels no responsibility to the litigants to explain or justify his decisions. He brooks no argument and does not tolerate even well-mannered oppositions to his views. He attempts to make his decisions in such a way that this (Tenth Circuit) Court will be unable to correct his errors. We do not believe that a judge so disposed should be permitted to continue to bear primary responsibility for the administration of justice in Utah federal courts."

PETITIONER agrees and respectfully requests this Honorable Court issue its Writ of Certiorari.

Respectfully submitted.

LEVINE AND PITLER, P.C.

Robert L. Pitler

ROBERT L. PITLER
1150 Delaware Street
Denver, CO 80204
(303) 892-5891
Registration No. 1139

Attorney for Petitioner

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 75-1767, 75-1781, 75-1782

UNITED STATES OF AMERICA, Appellee, v. VIRGIL REDMOND, CARL POWERS, FRANCIS LUND, Appellants.	Appeal From The United States District Court For The District of Utah Central Division (D. C. # CR-74-52)

Herbert W. DeLaney, Jr., Salt Lake City, Utah (Richard J. Leedy, Salt Lake City, Utah, on the Brief), for Appellant, Virgil Redmond.

Sumner J. Hatch, Hatch, McRae & Richardson, Salt Lake City, Utah, for Appellant, Carl Powers.

Walter R. Ellett, Murrah, Utah, for Appellant, Francis Lund.

Richard W. Beckler, Attorney, Criminal Division, Department of Justice (Ramon M. Child, United States Attorney, and Ronnie L. Edelman, Attorney, Criminal Division, Department of Justice, with him on the Brief), for Appellee.

Before LEWIS, Chief Judge, BREITENSTEIN and SETH, Circuit Judges.

SETH, Circuit Judge.

The defendants, Virgil Remond, Carl Powers, and Francis Lund, together with a corporate defendant, were charged under 15 U.S.C. §§77q(a) and 77x with the use of the mails in the fraudulent sale of securities. The case was tried to a jury, and each defendant was found guilty on eight counts. The court sentenced the individual defendants to a total of eighteen years. Each defendant was also fined $40,000.00.

The Government sought to prove that the defendants engaged in a scheme to defraud investors by selling stock following various mergers between Rio de Oro Mining Company and other corporations controlled by the defendants, or some of them. The Government also sought to show a scheme to defraud buyers of Rio de Oro stock by false representations as to a coal lease on Indian lands, as to coal reserves, and as to a power plant. These representations were made in an investment publication, Univest, and by taking potential investors to the mine location. The Government sought to prove that fraudulent representations and false publications were also made as to a joint venture between Rio de Oro and CM[I], another corporation controlled by the defendants, as to gold and uranium mining and mineral reserves. As to the "sale" aspect of the Government's case, its witnesses testified as to distribution of stock by the defendants to nominees and the transfer of shares to persons in exchange for goods and services. The Government witnesses testified to the sale by the defendants of some 5.4 million shares of stock.

On this appeal the defendants raise several points as to pretrial events which will be first considered. They also urge as error a number of matters which concern what they consider to be an excessive participation by the trial judge in the questioning of witnesses, and as to statements made by the judge in the presence of the jury, which they assert exceeded proper comment. The defendants raise several other issues as to the admissibility of evidence, instructions, motions during trial, and the sentences received.

I.

The defendants argue that the delay was excessive between the time the events took place, which serve as a basis for the charges, and the date of the indictment. Reliance is placed on United States v. Marion, 404 U.S. 307. The defendant Redmond acknowledges that the court in *Marion* did not directly decide the issue. The Court did however there hold that before consideration be given to preindictment delay, it must be shown to have been deliberately caused by the prosecution to gain a tactical advantage. We do not consider that the decision in *Marion* is here applicable in the absence of an indication that the delay was intentional. The issue is also without substance because the statements as to prejudice are conclusionary only. *See* United States v. Hauff, 395 F.2d 555 (7th Cir.). We considered the standards in United States v. MacClain, 501 F.2d 1006 (10th Cir.), and the showing here made does not meet the requirements therein stated.

II.

The defendants also urge that they were denied a speedy trial. The standards are now well established and, of course, include prejudice to the defendant, and the length and reason for the delay. Strunk v. United States, 412 U.S. 434; Barker v. Wingo, 407 U.S. 514; United States v. Latimer, 511 F.2d 498 (10th Cir.); United States v. Goeltz, 513 F.2d 193 (10th Cir.); United States v. Mackay, 491 F.2d 616 (10th Cir.).

The period of time between the date of the indictment and trial was seventeen months. The principal cause of delay in the prosecution of the case came about from the necessity of starting extradition proceedings to return defendant Lund from Canada. He did return in January 1975, and his counsel entered his appearance in March. It was necessary that the codefendants be tried together and no other defendants then objected to the Lund delay. There was a delay of eight months thereafter. There were problems with a crowded calendar and illness of the judge; however, a substantial part of the delay arose from the pretrial motions filed by the

defendants. Some thirty motions were considered, and this procedure caused much delay. These were extraordinary motions. There were no motions filed for a speedy trial until the motion of defendant Redmond to dismiss. This was filed very shortly before trial.

The defendants assert as to particular facts causing prejudice that a witness had died before trial, and certain documentary materials was not available because of the delay. However, there is no assertion that an attempt was made to obtain the corporate records, and the defendants were free on bond before trial. As to the deceased witness, the record shows that he died before the indictment was handed down.

We find no basis for the objection to lack of a speedy trial.

III.

The defendants urge that the prosecution by special attorneys, and their appearance before the grand jury, was not authorized. The Attorney General through his delegate appointed the special prosecutors, and special experience was required. We find no basis for the objections raised to this use of special prosecutors under 28 U.S.C. §515(a). United States v. Katz, 535 F.2d 593 (10th Cir.).

IV.

The trial judge actively questioned the prospective jurors and excused a substantial number. He excused those with certain stockholdings, generally those employed by the Government, and any who were acquainted with any of the attorneys. These exclusions we cannot say were arbitrary or were excessive. They did not in any way result in a lack of a fair trial nor with a jury not impartial by destroying the initial selection under the Jury Selection Act. The trial judge acted with the discretion to be exercised in the jury selection procedure. United States v. Porth, 426 F.2d 519 (10th Cir.).

V.

We have carefully examined the rulings on evidence complained of by the defendants, and we find no reversible error. The defendants complain also of the manner in which the rulings were made, and the comment by the trial judge which accompanied the rulings. These comments will be considered hereinafter. These trial rulings include those as to the Government witness Litchfield, who was apparently excused. Defendants had expected to use him but had not subpoenaed him. The trial judge acted within his discretion in not delaying the trial to permit the defendant to obtain the presence of this witness. We also considered the hearsay testimony of a deceased witness which was offered and excluded, and found no error.

VI.

The appellants urge as error the refusal of the trial court to grant motions for acquittal as to certain counts. This objection is basically an argument that there was not evidence that defendants were "sellers" or themselves sold some of the securities in question, or they were not "sellers" as to certain count transactions.

The record shows that the large number of shares, over eight million, which were issued following the merger of Rio de Oro with Midwest Petroleum Company and Tiger Oil Company went in large part to nominees who endorsed the certificates, and returned them to the defendants who disposed of them for their own accounts. There was also testimony that shares were issued to persons who sold them for the defendants for a percentage of the sales price.

Shares were also transferred or issued to individuals in exchange for goods and services. There is ample evidence to meet the statutory elements. The showing of the general scheme, with sales of stock generated by defendants, together with the use of the mails, is sufficient. United States v. Mackay, 491 F.2d 616 (10th Cir.).

The trial court considered the evidence in the standard applicable, and correctly refused the defendants' motions for judgment.

VII.

The defendants further object to certain instructions given to the jury. They first point out that the court gave all the instructions requested by the Government. This cannot be, of itself, a valid objection. Obviously if the instructions given are each correct and in all cover the issues tried, there can be no objection as to their source.

The court clearly instructed as to the use of the mails, and emphasized the need by the Government to show such use in furtherance of the scheme. United States v. Mackay, 491 F.2d 616 (10th Cir.).

The defendant Lund urges that he was only acting as attorney for Rio de Oro. The record shows however that his participation was an active one, and not as an attorney for the firm. This evidence was sufficient to warrant the refusal of the instructions he tendered as to mistake of law or fact by an attorney.

The defendant Redmond urges that the court should have given the instructions he requested on good faith and on withdrawal from the activities. The good faith defense was included in the general instructions given, and we must conclude that the matter was adequately covered. As to the fact that defendant Redmond was displaced as president of Rio de Oro, this did not provide a sufficient basis for an instruction that he had withdrawn. There was other evidence that his activity continued in a lesser capacity. We find no error in the refusal by the trial court as to the requested instructions. We must conclude that the defendants have shown no error in the instructions given or refused.

VIII.

The defendants assert that at the time they made their closing arguments, they were not aware of the court's ruling on instructions. We do not find such a violation of Rule 30 of the Rules of Criminal Procedure as to warrant a reversal. There is no showing by the defendants that they made their closing arguments with any expectation that certain instructions would or would not be given. There is nothing in the

record to demonstrate that a request was made for a ruling before argument. In short, there was an acquiescence in the trial court's delay which delay was contrary to Rule 30. The situation is thus not comparable to that presented to this court in Delano v. Kitch, 542 F.2d 550 (10th Cir.). *See also* United States v. Cardall and Golden Rule Associates, ____ F.2d ____ (10th Cir.) (Tenth Circuit Nos. 75-1768 and 75-1780); United States v. Pommerening, 500 F.2d 92 (10th Cir.); Whitlock v. United States, 429 F.2d 942 (10th Cir.); Downie v. Powers, 193 F.2d 760 (10th Cir.).

IX.

The defendants refer to many places in the record where they assert that the participation of the trial judge in the examination of witnesses was excessive to a point that it interfered in their conduct of the trial. They also urge that in these same incidents, and by comments made when ruling on the admission of evidence, the trial judge disclosed his view that the defendants were guilty.

The record does show a very extensive questioning of witnesses by the trial judge, as in many instances the questions and answers extend over two to four pages of the transcript. The questions by the trial judge are directed to the development of a certain point. Also the questions serve to emphasize by repetition the testimony as to certain incidents or events. We have examined the places in the record referred to on this point by the several defendants and other portions of the record. These have been considered as to their cumulative effect on the trial, and together with the other points urged by the defendants. We find no reversible error.

The trial judge commented at several places during the four-day trial when he ruled on the admissibility of evidence. These comments, urged as error by defendants, and as adding to a cumulative unfairness, were within bounds in that they did in fact explain the ruling made. The comments, in most instances, refer to the participation in the scheme by the several defendants, and as to the admissibility of testimony referring to the acts of only a single defendant. The explanation for the court's ruling was a variation on a

conspiracy doctrine, which was proper. The rulings perhaps did not need the kind of explanation they received, but we find no error, either as to individual incidents or as to their cumulative effect on the fairness of the trial. The same conclusion must be reached as to the restrictions on the arguments and questioning of witnesses by the attorneys. *See* United States v. Davis, 442 F.2d 72 (10th Cir.); Texaco, Inc. v. Chandler, 354 F.2d 655 (10th Cir.).

We have recently considered in United States v. Cardall and Golden Rule Associates, ____ F.2d ____ (10th Cir.) (Tenth Circuit Nos. 75-1768 and 75-1780), similar arguments as to the fairness of a trial. That opinion also refers to Whitlock v. United States, 429 F.2d 942 (10th Cir.), and United States v. Mackay, 491 F.2d 616 (10th Cir.). The three cases referred to above also involve trials conducted by the trial judge who tried this case. We said in the *Golden Rule* case that the comments taken as a whole did not destroy the fairness of the trial. When the standards in the above cited cases are applied, we must say here that the case before us comes close to the line, but is still within permissible bounds.

X.

The individual defendants were each sentenced, as described above, to a total of eighteen years on the several counts and each defendant was fined $40,000.00. The defendants urge that the sentences are excessive, and show that the trial judge was prejudiced against them. We also considered the issue of excessive sentences in the *Golden Rule* case and the same conclusion must be reached here. The sentences are within the statutory limits and the Court of Appeals does not modify sentences. *See also* United States v. Mackay, 491 F.2d 616 (10th Cir.), and United States v. Sierra, 452 F.2d 291 (10th Cir.).

AFFIRMED.

APPENDIX B

AFFIDAVIT

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, VIRGIL S. REDMOND, being put on my oath depose and state as follows:

On the morning of my trial in the case of the United States of America v. Virgil Redmond et al., I was informed by my attorney Richard Leedy that he was not prepared to go to trial, but that the case would not go to trial as the government attorneys intended to request a continuance. The government attorneys did not receive a continuance and Richard Leedy then said to me: "I am not prepared, for trial, but neither are they; so what the hell!" The only documents that Mr. Leedy had with him were the copies of the motions that he had filed. He had not subpoened a single witness, and neither did any of the attorneys for the other defendants, and this was in spite of the fact that I had given him at least a dozen names of witnesses who would verify my testimony and my theory of the defense.

I had furnished Richard Leedy with absolute documentary proof, a book published by the University of Utah – College of Mines and a United States Geological Survey which showed the potential value of the mine in question and these books were not only not mentioned, or introduced into evidence, but when I asked Mr. Leedy about the books at the time of the trial, he stated: "I can't find the books and it does not matter." These books, completely refuted the allegations of the government as to the invalidity of the defendant's statements concerning the mine.

Richard Leedy, had not made any preparation for trial, and as a result was completely unprepared and, therefore, unable to refute the government's contentions. He did not call one single witness, did not discuss my testimony, with me, and would not let me testify.

Richard Leedy had repeatedly informed me that the case would be continued or dismissed and would not go to trial and as a result there had been no preparation for trial.

Richard Leedy told me that about two-thirds of the attorneys, in Salt Lake City, could not practice before Judge Ritter because the Judge had thrown them out of his Court and that he, Richard Leedy, had to be quite careful that he not irritate the Judge in any way as he, then, would not let Mr. Leedy practice in Judge Ritter's Court and this would be just like taking away Mr. Leedy's license to practice in the Federal Court.

Richard Leedy also said that if he got Judge Ritter mad that the Judge would throw him in jail as the Judge had done this with other attorneys.

During the entire time that I was represented by Mr. Leedy, he repeatedly told me that he could not do or say certain things, in my defense, as he had other matters before Judge Ritter and if he got the Judge mad it would cause him to rule against Mr. Leedy on the other matters.

Mr. Leedy, repeatedly, told me that he would feel out the Judge, *"when they were at the club, drinking"* and would then *"find out his feelings on the motions"* that were then contemplated or filed.

Richard Leedy, and the other attorneys, were in such abject terror, of Judge Ritter, during the entire proceedings that their main concern was to not aggravate the Judge.

Judge Ritter, during the trial, repeatedly, in front of the jury as well as outside of the presence of the jury threatened the attorneys, the witnesses and all participants as well as the spectators. (One attorney, who was a spectator, was removed from the court room and questioned for wearing dark glasses and the attorney apologized for wearing dark glasses in Judge Ritter's Court.)

The entire attitude in the court room was oppressive, intimidating and threatening and the questioning, by Judge Ritter, of the witnesses was extensive and intimidating and

done in such a manner to convey to the jury that Judge Ritter considered the defendants guilty.

Both the government attorneys and the defendants' attorneys informed the court that the trial would take approximately three to four week and Judge Ritter said "It will take three or four days" and the defendants' attorneys were afraid that they would give the appearance of prolonging the trial and cut short even their questioning of witnesses.

Just prior to closing arguments the defendants' attorneys, and the defendants, had a conference in the halliway. The main concern of the attorneys was what they could say, in their closing arguments, without being held in contempt of court and being put in jail by Judge Ritter. One of them said: "I will go as far as I can go, even though it will, probably, be only a few sentences but when he tells me to sit down and shut up, I will do it because I am not going to spend thirty days in jail for contempt.

On the morning that the hearing was to be heard, concerning the government threatening witnesses, my attorney, at the time, Richard Leedy, was so frightened of the trial judge, Judge Ritter that he stopped at a bar, on the way to court and consumed three double shots of whiskey. Only after he had consumed the three double shots of whiskey did Richard Leedy have the courage to argue the Motion. After drinking the three double shots Richard Leedy was in such a comotose state that he forgot to call the witness involved, one Leo G. Bateman, who was ready, willing and able to testify that when he was called before the Grand Jury that the government attorneys did not like the way that he was testifying and they stopped the proceedings and in the presence of the Grand Jury went off the record and told Leo Bateman that they would indict him for perjury in another case, that involved the nephew of Leo Bateman, if he did not testify in the manner that the government attorneys desired.

I could not change attorneys because it is difficult, in Salt Lake City, to get an attorney that will appear in front of

Judge Ritter and I had paid all my life savings, and all of the monies that I could borrow to Mr. Leedy.

Immediately prior to the trial, Judge Ritter had helped the Judge's niece purchase an automobile from the witness, George Koroulis, who was in the automobile business. Mr. Koroulis had been given immunity by the government and when George Koroulis testified that defendant Powers had threatened him and Mr. Leedy objected as to Virgil Redmond, the demand, by Judge Ritter, that the testimony be repeated to the jury and his statements about the witness being a respected businessman was based upon the Judge having personal business dealings, of a self serving nature with the witness.

FURTHER AFFIANT SAYETH NAUGHT!

DATED this 7th day of January, 1977

/s/ VIRGIL S. REDMOND

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

The above named Virgil Redmond personally appeared before me and after being put upon his oath swore to and testified that each and every statement in the above Affidavit is completely true of his own knowledge.

/S/ Boyd M. Fullmer
NOTARY PUBLIC – Residing in
Salt Lake County, Utah

My Commission Expires:
7-29-77

APPENDIX C

AFFIDAVIT

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, DOUGLAS W. LITCHFIELD, being put upon my oath depose and state as follows:

In the case of the United States of America vs. Virgil Redmond et al., I had previously discussed the testimony that I would give, if called as a witness, and after giving the government's prosecuting attorneys this information they excused me that I could leave and need not return unless contacted further by the United States attorneys. I was not contacted further by the prosecution. I was contacted by the defense attorneys and I agreed to testify as a defense witness. The estimate was that the trial would take three or four weeks. I was in Gold Creek, Montana when I received a phone call from one of the defense attorneys asking me to appear the next day. I had people in from various areas, including Stamford, Connecticut and I rescheduled the meeting with them for 7:30 a.m. so that I could catch a plane to Salt Lake City. I was at the Butte, Montana Airport and I called Salt Lake City to let the attorneys know when I would arrive and I was informed that it was too late, that the case had gone to the jury.

My Resume is attached and if called, as a witness, I would have testified, as an expert witness, who has personally observed the Red Creek Mine, as follows:

That the mine would support a power plant according to the book: *Eastern and Northern Utah Coal Fields*, by H. H. Doelling and R. L. Graham, published by the Utah Geological and Mineralogical Survey affiliated with the College of Mines and Mineral Industries, University of Utah, Monograph Series #2, of 1972 and this is also my opinion.

Further, my personal observations and the source, mentioned hereinabove, would prove that:

1. The coal was a steam grade coal with an average of one (1%) sulphur.

2. That the coal reserves are extensive, mineable and would have carried a reasonable on-site program.

3. That the mine could have been an open pit type mine as well as an underground type mine.

4. That the coal seam was from twenty-five (25) feet to sixty-three (63) feet and this makes recovery, by open cut methods, economically feasible for a portion of the deposit. The balance would be recovered by underground methods.

5. That the two hundred acres under direct lease by Rio De Oro was the key to the acquisition of Federal Leases of the surrounding coal lands and, therefore, was extremely valuable. This is due to the step-out leasing policies of the Federal Government.

6. The Red Creek Mine had been opened and roads had been constructed and the mine was ready to be put into production.

7. There is extensive material, including photographs of the mine, on pages 281 through 321 (Pictures on 291, 306, 315) of the Doelling and Graham book. This book is considered the very best work on mines in the area where the Red Creek Mine is located and is always used as the final source of information concerning mines in the area. The book should have been introduced into evidence.

8. On site, at the Red Creek Mine was a great deal of equipment including D9 Caterpillar Bulldozers, with Rippers and a 275-A-Michigan Front End Loader. The approximate costs of the on-site equipment, at the time of trial, would have been Three Hundred Thousand Dollars ($300,000.00).

9. Virgil Redmond had asked me to make a truthful, accurate estimate of the value of the Red Creek Mine, and I would not have made any other kind, and my expert opinion is that the Red Creek Mine is, and was, a valuable, economically feasible, mineable mine and as the demand for coal, and energy, increased the value of the mine would increase.

10. I would further have referred to a booklet known as U.S. Geological Survey Bulletin 471 entitled: "The Blacktail (Tabby) Mountain Coal Field, Wasatch County, Utah" Lupton C.T. 1912. This document contains detailed information which would have been extremely valuable to the defense. Copies of this document and the Doelling and Graham book were in the possession of Richard Leedy, attorney for Virgil Redmond and by themselves would have refuted the government's contentions as to the Red Creek Mine.

FURTHER AFFIANT SAYETH NAUGHT!

SIGNED this 12th day of January, A.D. 1977.

/S/ DOUGLAS W. LITCHFIELD

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

The above named Douglas W. Litchfield personally appeared before me and after being put upon his oath swore to and testified that each and every statement in the above Affidavit is completely true of his own knowledge.

NOTARY PUBLIC – Residing in
Salt Lake County

My Commission Expires:
November 20, 1978

APPENDIX D

UNITED STATES DISTRICT COURT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,	)	
VS.	)	CASE NO. CR 74–52
RIO DE ORO MINING COMPANY, VIRGIL REDMOND, CARL POWERS, FRANCIS LUND, DEFENDANT.	)	

AFFIDAVIT

STATE OF UTAH)
: SS
COUNTY OF)

JOAN MARTINDALE, HAVING BEEN FIRST SWORN ON OATH DEPOSES AND SAYS:

1. Affiant is a resident of Iron County, State of Utah, and was formerly a resident of Salt Lake City, Salt Lake County, State of Utah.

2. In the fall of 1975, I was served a suppoena to testify, as a witness for the United States in the Case of Rio De Oro Mining Company, Virgil Redmond, Carl Powers and Francis Lund.

3. On the first day of the Trial, Pursuant to the instruction of the United States Attorney, I appeared in the Courtroom of Judge Willis W. Ritter, the presiding Judge. After some delay, all witnesses were requested to respond to a roll call, after which we were instructed by Judge Ritter about our conduct as witnesses during the trial. Judge Ritter

instructed us that we could not remain in the Courtroom not in the hall, but had to be placed in a witness room and would be held there until the trial was completed. Judge Ritter instructed us that during the trial we were not to talk to other witnesses or defendants, or anyone else, regarding our testimony or the trial. Specifically, Judge Ritter instructed all witnesses that we were not to talk to other witnesses or anyone else during the Trial. And that during or after we were called as witnesses and that a Marshall would supervise us during the trial. We were then taken to the witness room.

4. While in the witness room, I observed most, if not all, of the witnesses discuss with the other witnesses their testimony. They discussed and compared their individual testimonies with the other witnesses both before and after they testified.

5. I was asked about and discussed my testimony with several other witnesses both before and especially after I appeared on the stand. We all rallied around and supported each other because of the bad treatment we all received as witnesses by Judge Ritter.

6. The discussions of each others testimony took place every day of the trial.

7. During all the times there was a Marshall present in or around the witness room and he did not object to nor prohibit the discussions.

8. During the trial, Judge Ritter's attitude toward all witnesses was very abusive. His attitude toward me personally, as a witness, was very insulting and all witnesses felt the same and discussed it in the witness room. In fact, the witnesses were so upset about the way they were treated by Judge Ritter, that they contacted the local newspapers and an article appeared in the newspaper, about the third day of the trial, outlining the complaints of the abuse and inconsiderate attitude of Judge Ritter toward the witnesses in this trial. The article stated how the witnesses were in effect being held captive during the trial.

9. During the preliminary comments by the Judge, at the start of the trial, and prior to our being locked up in the witness room, I was very startled at the arbitrary attitude of Judge Ritter and his blatant disrespect toward the attorneys, witnesses and spectators. He was very insulting to the attorneys and as I watched him I became very apprehensive because I realized I had to testify before him.

10. In talking to the witnesses in the witness room, everybody commented about Judge Ritter's conduct and the insulting and abusive manner in which he treated everyone in his Court, especially the attorneys and witnesses.

11 Affiant does and did at said time of being called as witness, object to the treatment of the Witness by the Attorney's for the Government and the way they covered up pertinent testimony that may have helped the defendants.

12. Affiant does and did at said trial object to the way the trial was handled and that it was indeed fair and just, this conclusion is based on conversations that she did in fact overhear and that she will be willing to testify too.

13. Affiant admits that she contacted the Attorneys for the defense, voluntarily, and offered to make the above statement, and that Affiant made same honestly and to the best of her recollection and belief, and Affiant had not received any promises nor consideration for making said statement.

FURTHER AFFIANT SAYETH NOT.

/s/ Joan Martindale

Sworn and Subscribed to before me this 26th day of April, 1977.

/s/ Paul F. Beatty
Notary Public
Residing At: Cedar City, Utah 84720

My Commission Expires:
11-7-79